

107TH CONGRESS
1ST SESSION

S. 865

To provide small businesses certain protections from litigation excesses and to limit the product liability of nonmanufacturer product sellers.

IN THE SENATE OF THE UNITED STATES

MAY 10, 2001

Mr. McCONNELL (for himself and Mr. LIEBERMAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide small businesses certain protections from litigation excesses and to limit the product liability of nonmanufacturer product sellers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Small Business Liability Reform Act of 2001”.

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—SMALL BUSINESS LAWSUIT ABUSE PROTECTION

Sec. 101. Findings.

Sec. 102. Definitions.

Sec. 103. Limitation on punitive damages for small businesses.

Sec. 104. Limitation on joint and several liability for noneconomic loss for small businesses.

Sec. 105. Exceptions to limitations on liability.

Sec. 106. Preemption and election of State nonapplicability.

TITLE II—PRODUCT SELLER FAIR TREATMENT

Sec. 201. Findings; purposes.

Sec. 202. Definitions.

Sec. 203. Applicability; preemption.

Sec. 204. Liability rules applicable to product sellers, renters, and lessors.

Sec. 205. Federal cause of action precluded.

TITLE III—EFFECTIVE DATE

Sec. 301. Effective date.

1 **TITLE I—SMALL BUSINESS** 2 **LAWSUIT ABUSE PROTECTION**

3 **SEC. 101. FINDINGS.**

4 Congress finds that—

5 (1) the United States civil justice system is in-
6 efficient, unpredictable, unfair, costly, and impedes
7 competitiveness in the marketplace for goods, serv-
8 ices, business, and employees;

9 (2) the defects in the United States civil justice
10 system have a direct and undesirable effect on inter-
11 state commerce by decreasing the availability of
12 goods and services in commerce;

13 (3) there is a need to restore rationality, cer-
14 tainty, and fairness to the legal system;

15 (4) the spiralling costs of litigation and the
16 magnitude and unpredictability of punitive damage
17 awards and noneconomic damage awards have con-
18 tinued unabated for at least the past 30 years;

1 (5) the Supreme Court of the United States has
2 recognized that a punitive damage award can be un-
3 constitutional if the award is grossly excessive in re-
4 lation to the legitimate interest of the government in
5 the punishment and deterrence of unlawful conduct;

6 (6) just as punitive damage awards can be
7 grossly excessive, so can it be grossly excessive in
8 some circumstances for a party to be held respon-
9 sible under the doctrine of joint and several liability
10 for damages that party did not cause;

11 (7) as a result of joint and several liability, en-
12 tities including small businesses are often brought
13 into litigation despite the fact that their conduct
14 may have little or nothing to do with the accident
15 or transaction giving rise to the lawsuit, and may
16 therefore face increased and unjust costs due to the
17 possibility or result of unfair and disproportionate
18 damage awards;

19 (8) the costs imposed by the civil justice system
20 on small businesses are particularly acute, since
21 small businesses often lack the resources to bear
22 those costs and to challenge unwarranted lawsuits;

23 (9) due to high liability costs and unwarranted
24 litigation costs, small businesses face higher costs in

1 purchasing insurance through interstate insurance
2 markets to cover their activities;

3 (10) liability reform for small businesses will
4 promote the free flow of goods and services, lessen
5 burdens on interstate commerce, and decrease liti-
6 giousness; and

7 (11) legislation to address these concerns is an
8 appropriate exercise of the powers of Congress under
9 clauses 3, 9, and 18 of section 8 of article I of the
10 Constitution of the United States, and the 14th
11 amendment to the Constitution of the United States.

12 **SEC. 102. DEFINITIONS.**

13 In this title:

14 (1) CRIME OF VIOLENCE.—The term “crime of
15 violence” has the same meaning as in section 16 of
16 title 18, United States Code.

17 (2) DRUG.—The term “drug” means any con-
18 trolled substance (as defined in section 102 of the
19 Controlled Substances Act (21 U.S.C. 802)) that
20 was not legally prescribed for use by the defendant
21 or that was taken by the defendant other than in ac-
22 cordance with the terms of a lawfully issued pre-
23 scription.

24 (3) ECONOMIC LOSS.—The term “economic
25 loss” means any pecuniary loss resulting from harm

(including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(4) HARM.—The term “harm” means any physical injury, illness, disease, or death or damage to property.

(5) HATE CRIME.—The term “hate crime” means a crime described under section 1(b) of the Hate Crime Statistics Act (28 U.S.C. 534 note).

(6) INTERNATIONAL TERRORISM.—The term “international terrorism” has the same meaning as in section 2331 of title 18, United States Code.

(7) NONECONOMIC LOSS.—The term “non-economic loss” means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), injury to reputation, or any other nonpecuniary loss of any kind or nature.

(8) PERSON.—The term “person” means any individual, corporation, company, association, firm,

partnership, society, joint stock company, or any other entity (including any governmental entity).

(9) PUNITIVE DAMAGES.—The term “punitive damages” means damages awarded against any person or entity to punish or deter such person, entity, or others from engaging in similar behavior in the future. Such term does not include any civil penalties, fines, or treble damages that are assessed or enforced by an agency of State or Federal government pursuant to a State or Federal statute.

(10) SMALL BUSINESS.—

(A) IN GENERAL.—The term “small business” means any unincorporated business, or any partnership, corporation, association, unit of local government, or organization that has fewer than 25 full-time employees as determined on the date the civil action involving the small business is filed.

(B) CALCULATION OF NUMBER OF EMPLOYEES.—For purposes of subparagraph (A), the number of employees of a subsidiary of a wholly owned corporation includes the employees of—

(i) a parent corporation; and

1 (ii) any other subsidiary corporation
2 of that parent corporation.

3 (11) STATE.—The term “State” means each of
4 the several States, the District of Columbia, the
5 Commonwealth of Puerto Rico, the Virgin Islands,
6 Guam, American Samoa, the Northern Mariana Is-
7 lands, any other territory or possession of the
8 United States, or any political subdivision of any
9 such State, commonwealth, territory, or possession.

10 **SEC. 103. LIMITATION ON PUNITIVE DAMAGES FOR SMALL**
11 **BUSINESSES.**

12 (a) GENERAL RULE.—Except as provided in section
13 105, in any civil action against a small business, punitive
14 damages may, to the extent permitted by applicable Fed-
15 eral or State law, be awarded against the small business
16 only if the claimant establishes by clear and convincing
17 evidence that conduct carried out by that defendant with
18 a conscious, flagrant indifference to the rights or safety
19 of others was the proximate cause of the harm that is the
20 subject of the action.

21 (b) LIMITATION ON AMOUNT.—In any civil action
22 against a small business, punitive damages awarded
23 against a small business shall not exceed the lesser of—

24 (1) three times the total amount awarded to the
25 claimant for economic and noneconomic losses; or

1 (2) \$250,000,

2 except that the court may make this subsection inappli-
 3 cable if the court finds that the plaintiff established by
 4 clear and convincing evidence that the defendant acted
 5 with specific intent to cause the type of harm for which
 6 the action was brought.

7 (c) APPLICATION BY THE COURT.—The limitation
 8 prescribed by this section shall be applied by the court
 9 and shall not be disclosed to the jury.

10 **SEC. 104. LIMITATION ON JOINT AND SEVERAL LIABILITY**
 11 **FOR NONECONOMIC LOSS FOR SMALL BUSI-**
 12 **NESSES.**

13 (a) GENERAL RULE.—Except as provided in section
 14 105, in any civil action against a small business, the liabil-
 15 ity of each defendant that is a small business, or the agent
 16 of a small business, for noneconomic loss shall be deter-
 17 mined in accordance with subsection (b).

18 (b) AMOUNT OF LIABILITY.—

19 (1) IN GENERAL.—In any civil action described
 20 in subsection (a)—

21 (A) each defendant described in that sub-
 22 section shall be liable only for the amount of
 23 noneconomic loss allocated to that defendant in
 24 direct proportion to the percentage of responsi-
 25 bility of that defendant (determined in accord-

ance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable; and

(B) the court shall render a separate judgment against each defendant described in that subsection in an amount determined under subparagraph (A).

(2) PERCENTAGE OF RESPONSIBILITY.—For purposes of determining the amount of noneconomic loss allocated to a defendant under this section, the trier of fact shall determine the percentage of responsibility of each person responsible for the harm to the claimant, regardless of whether or not the person is a party to the action.

SEC. 105. EXCEPTIONS TO LIMITATIONS ON LIABILITY.

The limitations on liability under sections 103 and 104 do not apply—

(1) to any defendant whose misconduct—

(A) constitutes—

(i) a crime of violence;

(ii) an act of international terrorism;

or

(iii) a hate crime;

1 (B) results in liability for damages relating
2 to the injury to, destruction of, loss of, or loss
3 of use of, natural resources described in—

4 (i) section 1002(b)(2)(A) of the Oil
5 Pollution Act of 1990 (33 U.S.C.
6 2702(b)(2)(A)); or

7 (ii) section 107(a)(4)(C) of the Com-
8 prehensive Environmental Response, Com-
9 pensation, and Liability Act of 1980 (42
10 U.S.C. 9607(a)(4)(C));

11 (C) involves—

12 (i) a sexual offense, as defined by ap-
13 plicable State law; or

14 (ii) a violation of a Federal or State
15 civil rights law; or

16 (D) occurred at the time the defendant
17 was under the influence (as determined under
18 applicable State law) of intoxicating alcohol or
19 a drug, and the fact that the defendant was
20 under the influence was the cause of any harm
21 alleged by the plaintiff in the subject action; or

22 (2) to any cause of action which is brought
23 under the provisions of title 31, United States Code,
24 relating to false claims (31 U.S.C. 3729 through
25 3733) or to any other cause of action brought by

1 the United States relating to fraud or false state-
 2 ments.

3 **SEC. 106. PREEMPTION AND ELECTION OF STATE NON-**
 4 **APPLICABILITY.**

5 (a) PREEMPTION.—Subject to subsection (b), this
 6 title preempts the laws of any State to the extent that
 7 State laws are inconsistent with this title.

8 (b) ELECTION OF STATE REGARDING NONAPPLICA-
 9 BILITY.—This title does not apply to any action in a State
 10 court against a small business in which all parties are citi-
 11 zens of the State, if the State enacts a statute—

12 (1) citing the authority of this subsection;

13 (2) declaring the election of such State that this
 14 title does not apply as of a date certain to such ac-
 15 tions in the State; and

16 (3) containing no other provision.

17 **TITLE II—PRODUCT SELLER**
 18 **FAIR TREATMENT**

19 **SEC. 201. FINDINGS; PURPOSES.**

20 (a) FINDINGS.—Congress finds that—

21 (1) although damage awards in product liability
 22 actions may encourage the production of safer prod-
 23 ucts, they may also have a direct effect on interstate
 24 commerce and consumers of the United States by in-

1 creasing the cost of, and decreasing the availability
2 of, products;

3 (2) some of the rules of law governing product
4 liability actions are inconsistent within and among
5 the States, resulting in differences in State laws that
6 may be inequitable with respect to plaintiffs and de-
7 fendants and may impose burdens on interstate com-
8 merce;

9 (3) product liability awards may jeopardize the
10 financial well-being of individuals and industries,
11 particularly the small businesses of the United
12 States;

13 (4) because the product liability laws of a State
14 may have adverse effects on consumers and busi-
15 nesses in many other States, it is appropriate for the
16 Federal Government to enact national, uniform
17 product liability laws that preempt State laws; and

18 (5) under clause 3 of section 8 of article I of
19 the United States Constitution, it is the constitu-
20 tional role of the Federal Government to remove
21 barriers to interstate commerce.

22 (b) PURPOSES.—The purposes of this title, based on
23 the powers of the United States under clause 3 of section
24 8 of article I of the United States Constitution, are to

1 promote the free flow of goods and services and lessen the
2 burdens on interstate commerce, by—

3 (1) establishing certain uniform legal principles
4 of product liability that provide a fair balance among
5 the interests of all parties in the chain of production,
6 distribution, and use of products; and

7 (2) reducing the unacceptable costs and delays
8 in product liability actions caused by excessive litiga-
9 tion that harms both plaintiffs and defendants.

10 **SEC. 202. DEFINITIONS.**

11 In this title:

12 (1) **ALCOHOL PRODUCT.**—The term “alcohol
13 product” includes any product that contains not less
14 than ½ of 1 percent of alcohol by volume and is in-
15 tended for human consumption.

16 (2) **CLAIMANT.**—The term “claimant” means
17 any person who brings an action covered by this title
18 and any person on whose behalf such an action is
19 brought. If such an action is brought through or on
20 behalf of an estate, the term includes the claimant’s
21 decedent. If such an action is brought through or on
22 behalf of a minor or incompetent, the term includes
23 the claimant’s legal guardian.

24 (3) **COMMERCIAL LOSS.**—The term “commercial
25 loss” means—

1 (A) any loss or damage solely to a product
2 itself;

3 (B) loss relating to a dispute over the
4 value of a product; or

5 (C) consequential economic loss, the recov-
6 ery of which is governed by applicable State
7 commercial or contract laws that are similar to
8 the Uniform Commercial Code.

9 (4) COMPENSATORY DAMAGES.—The term
10 “compensatory damages” means damages awarded
11 for economic and noneconomic losses.

12 (5) DRAM-SHOP.—The term “dram-shop”
13 means a drinking establishment where alcoholic bev-
14 erages are sold to be consumed on the premises.

15 (6) ECONOMIC LOSS.—The term “economic
16 loss” means any pecuniary loss resulting from harm
17 (including the loss of earnings or other benefits re-
18 lated to employment, medical expense loss, replace-
19 ment services loss, loss due to death, burial costs,
20 and loss of business or employment opportunities) to
21 the extent recovery for that loss is allowed under ap-
22 plicable State law.

23 (7) HARM.—The term “harm” means any phys-
24 ical injury, illness, disease, or death or damage to

1 property caused by a product. The term does not in-
2 clude commercial loss.

3 (8) MANUFACTURER.—The term “manufac-
4 turer” means—

5 (A) any person who—

6 (i) is engaged in a business to
7 produce, create, make, or construct any
8 product (or component part of a product);
9 and

10 (ii)(I) designs or formulates the prod-
11 uct (or component part of the product); or

12 (II) has engaged another person to
13 design or formulate the product (or compo-
14 nent part of the product);

15 (B) a product seller, but only with respect
16 to those aspects of a product (or component
17 part of a product) that are created or affected
18 when, before placing the product in the stream
19 of commerce, the product seller—

20 (i) produces, creates, makes, con-
21 structs and designs, or formulates an as-
22 pect of the product (or component part of
23 the product) made by another person; or

24 (ii) has engaged another person to de-
25 sign or formulate an aspect of the product

1 (or component part of the product) made
2 by another person; or

3 (C) any product seller not described in
4 subparagraph (B) that holds itself out as a
5 manufacturer to the user of the product.

6 (9) NONECONOMIC LOSS.—The term “non-
7 economic loss” means loss for physical or emotional
8 pain, suffering, inconvenience, physical impairment,
9 mental anguish, disfigurement, loss of enjoyment of
10 life, loss of society and companionship, loss of con-
11 sortium (other than loss of domestic service), injury
12 to reputation, or any other nonpecuniary loss of any
13 kind or nature.

14 (10) PERSON.—The term “person” means any
15 individual, corporation, company, association, firm,
16 partnership, society, joint stock company, or any
17 other entity (including any governmental entity).

18 (11) PRODUCT.—

19 (A) IN GENERAL.—The term “product”
20 means any object, substance, mixture, or raw
21 material in a gaseous, liquid, or solid state
22 that—

23 (i) is capable of delivery itself or as an
24 assembled whole, in a mixed or combined

1 state, or as a component part or ingre-
2 dient;

3 (ii) is produced for introduction into
4 trade or commerce;

5 (iii) has intrinsic economic value; and

6 (iv) is intended for sale or lease to
7 persons for commercial or personal use.

8 (B) EXCLUSION.—The term “product”
9 does not include—

10 (i) tissue, organs, blood, and blood
11 products used for therapeutic or medical
12 purposes, except to the extent that such
13 tissue, organs, blood, and blood products
14 (or the provision thereof) are subject,
15 under applicable State law, to a standard
16 of liability other than negligence; or

17 (ii) electricity, water delivered by a
18 utility, natural gas, or steam.

19 (12) PRODUCT LIABILITY ACTION.—

20 (A) GENERAL RULE.—Except as provided
21 in subparagraph (B), the term “product liabil-
22 ity action” means a civil action brought on any
23 theory for a claim for any physical injury, ill-
24 ness, disease, death, or damage to property that
25 is caused by a product.

(B) The following claims are not included in the term “product liability action”:

(i) NEGLIGENT ENTRUSTMENT.—A claim for negligent entrustment.

(ii) NEGLIGENCE PER SE.—A claim brought under a theory of negligence per se.

(iii) DRAM-SHOP.—A claim brought under a theory of dram-shop or third-party liability arising out of the sale or providing of an alcoholic product to an intoxicated person or minor.

(13) PRODUCT SELLER.—

(A) IN GENERAL.—The term “product seller” means a person who in the course of a business conducted for that purpose—

(i) sells, distributes, rents, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce; or

(ii) installs, repairs, refurbishes, reconditions, or maintains the harm-causing aspect of the product.

(B) EXCLUSION.—The term “product seller” does not include—

1 (i) a seller or lessor of real property;

2 (ii) a provider of professional services

3 in any case in which the sale or use of a

4 product is incidental to the transaction and

5 the essence of the transaction is the fur-

6 nishing of judgment, skill, or services; or

7 (iii) any person who—

8 (I) acts in only a financial capac-

9 ity with respect to the sale of a prod-

10 uct; or

11 (II) leases a product under a

12 lease arrangement in which the lessor

13 does not initially select the leased

14 product and does not during the lease

15 term ordinarily control the daily oper-

16 ations and maintenance of the prod-

17 uct.

18 (14) STATE.—The term “State” means each of

19 the several States, the District of Columbia, the

20 Commonwealth of Puerto Rico, the Virgin Islands,

21 Guam, American Samoa, the Northern Mariana Is-

22 lands, any other territory or possession of the

23 United States, or any political subdivision of any

24 such State, commonwealth, territory, or possession.

1 **SEC. 203. APPLICABILITY; PREEMPTION.**

2 (a) APPLICABILITY.—

3 (1) IN GENERAL.—Except as provided in para-
4 graph (2), this title governs any product liability ac-
5 tion brought in any Federal or State court.

6 (2) ACTIONS FOR COMMERCIAL LOSS.—A civil
7 action brought for commercial loss shall be governed
8 only by applicable State commercial or contract laws
9 that are similar to the Uniform Commercial Code.

10 (b) RELATIONSHIP TO STATE LAW.—This title su-
11 persedes a State law only to the extent that the State law
12 applies to an issue covered by this title. Any issue that
13 is not governed by this title, including any standard of
14 liability applicable to a manufacturer, shall be governed
15 by any applicable Federal or State law.

16 (c) EFFECT ON OTHER LAW.—Nothing in this title
17 shall be construed to—

18 (1) waive or affect any defense of sovereign im-
19 munity asserted by any State under any State law;

20 (2) supersede or alter any Federal law;

21 (3) waive or affect any defense of sovereign im-
22 munity asserted by the United States;

23 (4) affect the applicability of any provision of
24 chapter 97 of title 28, United States Code;

1 (5) preempt State choice-of-law rules with re-
 2 spect to claims brought by a foreign nation or a cit-
 3 izen of a foreign nation;

4 (6) affect the right of any court to transfer
 5 venue or to apply the law of a foreign nation or to
 6 dismiss a claim of a foreign nation or of a citizen
 7 of a foreign nation on the ground of inconvenient
 8 forum; or

9 (7) supersede or modify any statutory or com-
 10 mon law, including any law providing for an action
 11 to abate a nuisance, that authorizes a person to in-
 12 stitute an action for civil damages or civil penalties,
 13 cleanup costs, injunctions, restitution, cost recovery,
 14 punitive damages, or any other form of relief, for re-
 15 mediation of the environment (as defined in section
 16 101(8) of the Comprehensive Environmental Re-
 17 sponse, Compensation, and Liability Act of 1980 (42
 18 U.S.C. 9601(8))).

19 **SEC. 204. LIABILITY RULES APPLICABLE TO PRODUCT**
 20 **SELLERS, RENTERS, AND LESSORS.**

21 (a) GENERAL RULE.—

22 (1) IN GENERAL.—In any product liability ac-
 23 tion covered under this title, a product seller other
 24 than a manufacturer shall be liable to a claimant
 25 only if the claimant establishes that—

1 (A)(i) the product that allegedly caused the
2 harm that is the subject of the complaint was
3 sold, rented, or leased by the product seller;

4 (ii) the product seller failed to exercise rea-
5 sonable care with respect to the product; and

6 (iii) the failure to exercise reasonable care
7 was a proximate cause of the harm to the
8 claimant;

9 (B)(i) the product seller made an express
10 warranty applicable to the product that alleg-
11 edly caused the harm that is the subject of the
12 complaint, independent of any express warranty
13 made by a manufacturer as to the same prod-
14 uct;

15 (ii) the product failed to conform to the
16 warranty; and

17 (iii) the failure of the product to conform
18 to the warranty caused the harm to the claim-
19 ant; or

20 (C)(i) the product seller engaged in inten-
21 tional wrongdoing, as determined under applica-
22 ble State law; and

23 (ii) the intentional wrongdoing caused the
24 harm that is the subject of the complaint.

1 (2) REASONABLE OPPORTUNITY FOR INSPEC-
 2 TION.—For purposes of paragraph (1)(A)(ii), a
 3 product seller shall not be considered to have failed
 4 to exercise reasonable care with respect to a product
 5 based upon an alleged failure to inspect the product,
 6 if—

7 (A) the failure occurred because there was
 8 no reasonable opportunity to inspect the prod-
 9 uct; or

10 (B) the inspection, in the exercise of rea-
 11 sonable care, would not have revealed the as-
 12 pect of the product that allegedly caused the
 13 claimant's harm.

14 (b) SPECIAL RULE.—

15 (1) IN GENERAL.—A product seller shall be
 16 deemed to be liable as a manufacturer of a product
 17 for harm caused by the product, if—

18 (A) the manufacturer is not subject to
 19 service of process under the laws of any State
 20 in which the action may be brought; or

21 (B) the court determines that the claimant
 22 is or would be unable to enforce a judgment
 23 against the manufacturer.

24 (2) STATUTE OF LIMITATIONS.—For purposes
 25 of this subsection only, the statute of limitations ap-

1 plicable to claims asserting liability of a product sell-
2 er as a manufacturer shall be tolled from the date
3 of the filing of a complaint against the manufacturer
4 to the date that judgment is entered against the
5 manufacturer.

6 (c) RENTED OR LEASED PRODUCTS.—

7 (1) DEFINITION.—For purposes of paragraph
8 (2), and for determining the applicability of this title
9 to any person subject to that paragraph, the term
10 “product liability action” means a civil action
11 brought on any theory for harm caused by a product
12 or product use.

13 (2) LIABILITY.—Notwithstanding any other
14 provision of law, any person engaged in the business
15 of renting or leasing a product (other than a person
16 excluded from the definition of product seller under
17 section 202(13)(B)) shall be subject to liability in a
18 product liability action under subsection (a), but any
19 person engaged in the business of renting or leasing
20 a product shall not be liable to a claimant for the
21 tortious act of another solely by reason of ownership
22 of that product.

1 **SEC. 205. FEDERAL CAUSE OF ACTION PRECLUDED.**

2 The district courts of the United States shall not
3 have jurisdiction under this title based on section 1331
4 or 1337 of title 28, United States Code.

5 **TITLE III—EFFECTIVE DATE**

6 **SEC. 301. EFFECTIVE DATE.**

7 This Act shall take effect with respect to any civil
8 action commenced after the date of the enactment of this
9 Act without regard to whether the harm that is the subject
10 of the action occurred before such date.

